



Michael Vrisakis Hi everyone. I’m Michael Vrisakis, a Partner in the Herbert Smith Freehills Financial Services Team. Welcome to our podcast series called the FSR GPS. This series focuses on topical and emerging issues in financial services regulation which we think are the most strategic and important issues for our clients. Feel free to suggest topics you would like us to cover in the future but for now, we hope you enjoy today’s episode.

Tamanna Islam Good morning everyone and thank you for joining us today. I’m Tamanna Islam, a Senior Associate in our FSR team here at HSF. I’m joined by some of my colleagues from the FSR team, Shan-Verne Liew, who is also a Senior Associate and Isabel Chong, a solicitor in our team. Hi both, it’s good to have you here.

Isabel Chong Thanks Tamanna, it’s great to be here.

Shan-Verne Liew Great to be here also.

Tamanna Islam So we are here to talk about a topic that seems to be on everyone’s lips – and that is the breach reporting relief given by ASIC a few weeks ago. This relief was quickly followed by ASIC’s 2nd report on its insights from the breach reporting regime – and that report states that while there has been a bit of an increase in breach reporting numbers, from ASIC’s perspective, those numbers remain low and indicate a relatively widespread case of non-compliance with the regime.

But jumping back onto the relief which is what we are talking about today – as most listeners will be aware, ASIC registered its breach reporting relief through an ASIC instrument called the ASIC Corporations and Credit (Amendment) Instrument 2023/589, which provides some relief from the obligation to report significant breaches to ASIC under Chapter 7 of the Corporations Act.

It is safe to say that the relief is very welcome across the industry and it is great to see ASIC willing to consult and hear industry feedback on this topic. But like all things in this space, the ASIC Instrument does give rise to some



practical questions around its scope and application, which we will look to unpack today based on some of our recent experience across the industry.

To get us started, Isabel, maybe you could give us a quick overview of what relief the Instrument provides?

Isabel Chong

Sure. In summary, the Instrument provides two categories of relief from the ASIC breach reporting regime under section 912DAA of the Corporations Act.

The first category of relief is that certain minor instances of misleading or deceptive conduct will not be deemed significant for the purposes of the breach reporting regime.

The second category of relief is that licensees will have 90 days instead of the usual 30 days to notify ASIC of a reportable situation that has the same underlying circumstance as a matter that has previously been reported to ASIC.

It's that first category of relief, regarding the reportability of minor misleading or deceptive conduct breaches, which has generated a lot of industry discussion and what we will focus on today.

As we know, before ASIC granted the relief, the default position had been that any breach of the misleading or deceptive conduct prohibitions was deemed significant under the legislation and therefore automatically reportable to ASIC.

Shan-Verne Liew

Yes, and that default position has been the source of considerable confusion and resource strain across the industry, without corresponding material regulatory benefits where licensees were reporting isolated errors with no relevant loss or damage to affected clients.

Even ASIC has mentioned that reporting misleading or deceptive conduct incidents which are the subject of the relief have limited regulatory intelligence value to the regulator.

Isabel Chong

That's right. It may be helpful to unpack when the misleading or deceptive conduct relief will apply.



In summary, the Instrument provides that a breach of section 1041H(1) of the Corporations Act or sections 12DA(1) or 12DB(1) of the ASIC Act will not be deemed significant if four criteria are satisfied.

The first criteria is that the underlying circumstances relating to the breach must, and must be likely to, give rise to only a single reportable situation. Importantly, if there is a breach of one or more of sections 1041H, 12DA or 12DB on one occasion, the Instrument will treat this as only a single reportable situation.

The second criteria is that the breach must impact only one person, or if there are joint product holders, only those joint holders.

The third criteria is that the breach must not involve a contravention of any core obligation other than those set out in section 1041H of the Corporations Act or sections 12DA or 12DB of the ASIC Act.

The fourth criteria is that the breach must have not resulted in, and must be unlikely to result in, any financial loss or damage to any person, regardless of whether the loss or damage is, will be or may be remediated.

Tamanna Islam Thanks Isabel. Quite a few very specific requirements here for a licensee to rely on the relief. Let's start with the first and second criteria, which are related, and which require that the underlying circumstance in relation to the breach must give rise to only one reportable situation, and must impact only one person (or two persons in the case of joint holders as you just mentioned, Isabel). Shan – what is required here?

Shan-Verne Liew So as we know, a reportable situation includes a significant breach of a core obligation.

If an underlying circumstance gives rise to several breaches of the same obligation – for example, if an error in a frontline call script gives rise to multiple instances of misleading or deceptive conduct to separate customers, then there will be more than one reportable situation relating to the underlying circumstance and more than one affected client, so the relief will not be available.

For this reason, we think these criteria in ASIC's relief will typically be satisfied in one-off non-scripted interactions with individual consumers. This could include a conversation with a customer in a branch, a response to an email query or a non-scripted conversation with a customer over the phone.



Errors in scripted material, such as errors in a call centre script, a systems issue, or errors in a disclosure document, are more likely to affect more than one person and give rise to repeated reportable situations linked to the same underlying circumstances, where the relief would not be available.

For example, an error in the script for an online chatbot could lead to the dissemination of incorrect information impacting more than one customer.

Tamanna Islam

So perhaps to put it another way, these first two criteria will typically be satisfied where there are isolated or effectively unplanned errors – for example, as you say, where someone basically says the wrong thing by mistake. Because a scripted error is more likely to give rise to more than one reportable situation.

But what a scenario where two customer service representatives separately communicate independent errors to different consumers? Could each misrepresentation be treated as independent and therefore, eligible for the ASIC relief?

Isabel Chong

To answer that question, you'd have to consider the underlying circumstance that gave rise to the breach. If each misrepresentation was unrelated and had a different underlying circumstance, then yes, I think the relief would be available.

However, if the misrepresentations arose from the same underlying circumstance, such as an outdated call script, then no, you can't rely on the relief.

Interestingly, the ASIC Instrument refers to the concept of reportable situations arising from the same underlying circumstance, but ASIC in the Explanatory Statement treats the concept of an underlying circumstance as analogous to its concept of a root cause in RG 78. So really, this is just a question of fact.

Tamanna Islam

Thanks Isabel, that's quite helpful to go back to some of those principals in RG 78. So going back to the main four criteria for the relief – we've spoken about the first two. The third criteria for ASIC's relief is that the breach must not involve a contravention of any core obligation other than those set out in section 1041H of the Corporations Act or sections 12DA or 12DB of the ASIC Act (which are the misleading and deceptive conduct provisions). As



we know, these sections are the ones where breaches are deemed significant for reporting purposes.

There are a few pitfalls to be careful with here. Where a communication with a client involves a regulated disclosure document or a regulated disclaimer, a misrepresentation is also likely to trigger a breach of a separate disclosure obligation. Where this happens, the relief would not be available.

An example of this would be where, in the course of making a misrepresentation, a licensee fails to give a general advice warning. Such warnings are required where the advice does not take into account the client's objectives, financial situation or needs and failure to give one would amount to breach of section 949A of the Corporations Act.

In this situation, ASIC's relief would not apply because the obligation to give a general advice warning is itself deemed significant and automatically reportable to ASIC.

Another example would be where a superannuation trustee publishes incorrect information, such as an incorrect account balance, in a single member's annual statement. While that incident only affects one member, the error can trigger a breach of the periodic statement obligations in section 1017D(5)(a) of the Corporations Act, in addition to the misleading or deceptive conduct provision, so again, the ASIC relief would not be enliven.

That fourth criteria of ASIC's relief around financial loss or damage has been giving rise to a lot of questions. This criteria is that the breach must have not resulted in, and must be unlikely to result in, any financial loss or damage to any person, regardless of whether the loss or damage is, will be or may be remediated.

What does it mean for a breach to be "unlikely" to result in financial loss or damage? How is the degree of likelihood to be assessed?

Shan-Verne Liew

That's a really good question. ASIC has provided limited guidance on that. When we talk about "likelihood", we do so in terms of whether an outcome is more likely than not, measured on the balance of probabilities.

There is a distinction between 'likelihood' and 'foreseeability'. When the relief says it must be 'unlikely' that loss or damage would arise, this means it must be more likely than not that no loss or damage would arise.



Tamanna Islam Interesting. Let's get into some examples. But before we get into some examples, it is warranted to talk about some threshold issues. One of those issues is that it is actually important to note that there will be no need to rely on ASIC's relief if the conduct does not actually involve misleading or deceptive conduct. So we've previously spoken and written about situations where misstatement made by a licensee or an individual representative will not necessarily amount to misleading or deceptive conduct. There are several factors to consider here, such as the dominant message given by the misstatement and whether the risk of leading a customer into error is only remote.

So it is actually important that the analysis of whether something is, in fact, misleading or deceptive conduct should be undertaken as a threshold matter before you even get to the question of the relief.

But jumping back to the ASIC relief. Shan, can you provide some examples in relation to that fourth criteria under the relief i.e. when a relevant breach does not, and is unlikely to, result in any loss or damage?

Shan-Verne Liew We have come up with four categories of scenarios where the relief could apply, which we'll run through.

The first scenario arises where the inaccuracy is corrected before the individual acts on the misrepresentation to their detriment.

The Explanatory Statement to the Instrument gives several examples of this – one of those examples and I quote:

incorrectly advising a customer about the amount of daily external transfer that they are permitted to make during a phone call and correcting the error on the same call in circumstances where there is no actual or anticipated financial loss to the consumer.

Isabel Chong That's right. It's probably helpful to flag at this point that there is a distinction between "correction" and "remediation". In this context, a "correction" prevents loss or damage from arising in the first place, and "remediation" makes good any loss or damage which has already occurred.

The relief will apply if a misrepresentation is corrected before there is an opportunity for any loss or damage to arise in the first place.

But if an error is not corrected on the same phone call and the customer acts on that misinformation and suffers loss, then whether that loss is subsequently remediated will not be sufficient to qualify for the relief.



Tamanna Islam	<p>This is actually an interesting example.</p> <p>The Explanatory Statement for the relief refers to several examples where a misrepresentation is quickly identified and corrected by the licensee.</p> <p>I would challenge whether such a scenario even gives rise to misleading or deceptive conduct in the first place. So again going back to the threshold analysis. There is certainly some case law to the effect that if an error is corrected in the same interaction with a customer, it can effectively neutralise any misleading or deceptive conduct. In other words, there is no misleading conduct to start with, as there is no scope to lead the customer into error.</p> <hr/>
Isabel	<p>I think that's right. These scenarios will be inherently situational. It will depend on the facts known to the licensee at the time of the assessment – but we would certainly envisage that some of these examples are not misleading or deceptive to start with.</p> <p>How the courts characterise misleading and deceptive conduct under Australian Consumer Law provides some guidance on this point. Corrections or qualifying statements can neutralise otherwise misleading or deceptive representations if they are:</p> <ul data-bbox="550 1176 1340 1332" style="list-style-type: none">• accurate;• made contemporaneously with the conduct they qualify or correct; and• sufficiently prominent such that they dispel any potentially incorrect conclusions that may arise. <p>Whether these criteria are satisfied must be assessed at the time the misrepresentation is made and in the context of the overall interaction. For example, if the same misrepresentation is given twice in one conversation, this may nullify the neutralising effect of any earlier correction.</p> <hr/>
Shan-Verne Liew	<p>That's right. The second scenario around financial loss would be where no relevant action is taken by the customer in reliance on the misrepresentation, and no action is likely to be taken by the customer.</p> <p>For example, where a customer service agent misstates a member's account balance, but the member does not intend to (and does not in any case) take any action with respect to that information.</p> <p>In that situation, there is no likely loss or damage, because it is unlikely that the customer will take any action in response to the information.</p> <hr/>



- Tamanna Islam I think that's right. Another example here could be perhaps where a customer is told that a document will be posted to them, but instead it's emailed. Not only is there no loss in this case, but even if there is loss, it would not actually constitute as financial loss, which is a specific indicia in ASIC's relief.
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- Shan-Verne Liew Yes. The third scenario will arise where a customer avoids loss or damage by electing not to proceed with potential action linked to the inaccuracy.
- For example, if an insurer understates the premium of an insurance policy by stating it costs \$300 instead of \$350, and the customer elects not to obtain that policy anyway. It doesn't matter that the cost of the product is higher – the customer has walked away so they don't bear any loss or damage.
- And finally, the fourth scenario we have developed arises where the inaccuracy is actually beneficial to the customer.
- This would happen, for example, where a licensee overstates the fees or costs of a financial product, and the member elects to acquire the product and ultimately pays less fees than anticipated. Another example of this scenario is if the licensee understates the amount of the person's existing insurance cover and the member makes a claim anyway.
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- Isabel Chong I have a slightly unique scenario. What if, say, an insurer understates the amount of cover an insurance product offers. For example, a home and contents insurance policy. Cover is offered for personal effects to the value of \$50,000, but this figure is incorrectly advertised as \$30,000.
- The customer purchases the insurance but then secures additional insurance to make up for the shortfall in cover. Have they suffered loss or damage in that scenario by obtaining further insurance?
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- Tamanna Islam This is a really complex example, Isabel. What makes assessing that scenario difficult is the fact that there is no definition provided of "financial loss", as well as the difficulty of knowing how a customer is likely to respond or act to the misrepresentation, because any such response or action will inherently be dictated by the personal circumstances of the customer which the insurer is unlikely to know.
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The common law definition of “financial loss” is likely to apply in this case. It can be argued that the customer has suffered pure economic loss by acquiring the additional insurance cover, even though their entitlement under the first insurance policy was never diminished.

The Explanatory Statement takes a similar position. It says at paragraph 31 – and I quote:

financial loss or damage to any person ... includes immediate or future financial loss or damage...

In your example, Isabel, the fact that the customer has taken out additional insurance on the basis of a misrepresentation is most likely to amount to consequential loss. By acquiring the additional insurance, the customer has experienced consequential loss by being required to pay a premium for the additional product.

Therefore, prima facie, relief under the Instrument would not be available. It is a separate issue altogether I think in terms of what the insurer knows – for example, would the insurer be aware the customer went and obtained further insurance so that it can assess whether it can rely on the relief – possibly that’s something that would only come to light during a claims process.

Shan-Verne Liew

That’s right, how a customer is likely to respond to a particular error or misrepresentation cannot be accurately predicted with absolute certainty, in the same way that it’s not possible to predict with absolute certainty the amount of loss or damage that’s likely to be borne by any person. This highlights that every scenario needs to be assessed on a case-by-case basis.

Tamanna Islam

Well thanks both. I think that’s all the time we have for today. This has been a great discussion with Shan and Isabel, and thank you everyone for listening in. If you have any interesting scenarios you are grappling with under ASIC’s relief instrument, we would love to hear from you.

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